



January 15, 2024

Washington State Building Code Council  
PO Box 41449, Olympia, WA 98504

Via email: sbcc@des.wa.gov

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Re: WPC Public Comment in Support of Repealing Amendments to the 2021 WSEC Due to  
Noncompliance with the Regulatory Fairness Act

To the Honorable Members of the State Building Code Council (the Council),

The Washington Policy Center (WPC) is grateful to the Council for taking the time to consider our [petition](#) for repeal of the recent amendments to the 2021 Washington State Energy Code (WSEC)—[WSR 23-21-106](#) (Commercial) and [WSR 23-21-105](#) (Residential)—due to the Small Business Economic Impact Statements (SBEIS) not properly complying with the Regulatory Fairness Act (RFA).

### **History**

Last November, we discovered potential issues with the Small Business Economic Impact Statement (SBEIS) included the CR-102 filings for the proposed amendments to the WSEC not fully complying with the Regulatory Fairness Act (RFA). To alert the Council to this issue, we submitted both written and virtual [testimony](#) the public hearings for the proposed changes. We also emailed the ex officio legislative members of the Council to notify them of the issue and ask that they formally request the Council review the SBEIS and RFA (see attached document). Despite these efforts there was not substantial discussion about the core of the SBEIS noncompliance with the RFA.

Because the process was not correctly followed this negatively affected stakeholders' and the public's ability to determine the true cost of compliance with the proposed rules and submit public comment reflecting that information. Furthermore, Council members did not have complete estimates and analysis of the cost of compliance for small businesses so they could appropriately mitigate those costs as required by the RFA. The best course of action is for the Council to repeal the recently amended rules and start the process anew.



## **The Issue**

The Council determined that it met the thresholds to include a mandatory SBEIS under the APA. By the Council's own accounting, an SBEIS was required to comply with the APA and RFA.

As we stated in our [petition](#) there are several components from the SBEIS that are missing or not fully complying with the RFA.

- A. Full analysis of the costs of compliance for businesses. Including: costs of equipment, supplies, labor, professional services, and increased administrative costs ([RCW 19.85.040 \(1\)](#)).
- B. Full analysis on whether compliance with the rule will cause businesses to lose sales or revenue ([RCW 19.85.040 \(1\)](#)).
- C. Lack of a comparison of the cost of compliance for small businesses with the cost of compliance for the 10% of businesses that are the largest businesses required to comply with the proposed rules using at least one of the following for comparing costs ([RCW 19.85.040 \(1\)](#)): (a) cost per employee, (b) cost per hour of labor; or (c) cost per one hundred dollars per sales.
- D. Full analysis of the steps taken to reduce or mitigate costs for small businesses or an explanation why the agency can't reduce costs ([RCW 19.85.040 \(2\)\(a\)](#)).
- E. A full estimate of the number of jobs that will be created or lost as the result of compliance ([RCW 19.85.040 \(d\)](#)).

Component C is entirely absent from the SBEIS, which is one of the most crucial elements as it provides an apples-to-apples comparison for the cost of compliance for all businesses. Without proper estimates and analysis, it is impossible that the Council was accurately able to fulfill the requirement to mitigate costs of compliance for small businesses (component D) because the Council does not know what those costs are.

For components A, B, and E the submitted SBEIS in the CR-102 filing makes claims without providing supporting research, data, documentation, and analysis.

In our research we noticed there are potentially similar issues with past SBEIS filed in the original 2021 WSEC proposals. It appears multiple components are often just copied and pasted from SBEIS to SBEIS instead of performing a new SBEIS for each proposed rule change. We also did not find any statute of limitations in raising these concerns through an appeals process. If the Council fails to resolve the issues with the SBEIS noncompliance with the RFA then the risk of external review and legal challenges will increase not only for the recent amendments to the WSEC but past and future code changes as well.

## **Repeal**

The best path forward is for the Council to repeal the recently adopted rules and restart the rulemaking process. This is necessary as the SBEIS is required to be filed with the CR-102. This allows affected businesses and members of the public to weigh in on the SBEIS through public comment. Council



members may then use that feedback to inform their decision making and ensure that the Council has fulfilled its duty to mitigate the cost of compliance for small businesses.

An attempt to redo the SBEIS *after* the rulemaking process has concluded would defeat the purpose of the SBEIS and the intent of the RFA. Affected small businesses may face negative outcomes if the code changes are allowed to go into effect without properly calculating and mitigating the cost of compliance for small business. In creating the RFA the legislature found that “disproportionate impact reduces competition, innovation, employment, and new employment opportunities, and threatens the very existence of some small businesses.”

Thank you for your time and consideration.

Sincerely,

Todd Myers  
Environmental Director  
Washington Policy Center

Patrick Hanks  
Project Coordinator  
Washington Policy Center

Attached: November Email to Legislative Ex Officio Council Members



**Attachment #1 – November Email to Ex Officio Members**

**From:** Patrick Hanks  
**Sent:** Wednesday, November 22, 2023 1:40 PM  
**To:** keith.goehner@leg.wa.gov; Alex.Ramel@leg.wa.gov; john.lovick@leg.wa.gov; Lynda.Wilson@leg.wa.gov  
**Cc:** Todd Myers  
**Subject:** SBCC Noncompliance with Regulatory Fairness Act

Dear Representatives Goehner and Ramel, and Senators Lovick and Wilson,

I write to notify you of a potential issue I discovered with the Small Business Economic Impact Statements (SBEIS) included in the most recent CR-102s for the WSEC, [Commercial](#) and [Residential](#) not properly complying with the [Regulatory Fairness Act](#).

Components from the SBEIS that are missing or not fully complying with [RCW 19.85.040](#):

- Full analysis of the costs of compliances for businesses. Including: costs of equipment, supplies, labor, professional services, and increased administrative costs (1).
- Full analysis on whether compliance with the rule will cause businesses to lose sales or revenue (1).
- Lack of a comparison of the cost of compliance for small businesses with the cost of compliance for the 10% of businesses that are the largest businesses required to comply with the proposed rules using at least one of the following for comparing costs (1): (a) cost per employee, (b) cost per hour of labor; or (c) cost per one hundred dollars per sales.
- Full analysis of the steps taken to reduce or mitigate costs for small businesses or an explanation why the agency can't reduce costs (2)(a).
- A full description of how the agency involved small businesses in the development of the rule (b).
- A full estimate of the number of jobs that will be created or lost as the result of compliance (d).
- Did not state if the SBCC surveyed a representative sample of affected businesses or trade associations to accurately assess costs (3).

The Governor's Office for Regulatory Innovation & Assistance (ORIA) has [webpage](#) with guidance documents to help agencies in complying with the Regulatory Fairness Act. If you compare the SBEIS Template and Example SBEIS on that webpage, with the SBEIS included in the WSEC CR-102s you will notice a stark difference in the substance of analysis and estimates.

I appreciate that the council did not claim an exemption from completing a SBEIS through [RCW 19.85.061](#). While these amendments are being pursued to comply with the federal Energy Policy and Conservation Act of 1975, they are substantial enough to warrant a full SBEIS so the public and council members can fully weigh the amendments costs and benefits.



Furthermore, according to a [guidance document](#) from the Attorney General’s office on the Regulatory Fairness Act, “the failure to conduct a full and complete analysis leaves the rule open to potential challenge.”

Initially I thought the full SBEIS was not published in the CR-102s and reached out to council staff for a copy of the full statement as directed so by the CR-102. Council staff informed me the full SBEIS was included in the CR-102s.

I have submitted public testimony to the SBCC for the proposed changes alerting them to this issue and asking them to confirm if they are properly complying with the statutory requirements with staff and legal experts. To ensure that this issue is addressed, I request that as legislators and ex officio members of the SBCC you formally write a letter to the SBCC and request a review of the SBEIS and its compliance with the Regulatory Fairness Act.

Please reach out if there are any questions I can answer.

Respectfully,  
Patrick Hanks



**Patrick Hanks**  
Project Coordinator  
Washington Policy Center

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